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NO. 73-501

In the Supreme Court of the United States

OCTOBER TERM 1973

PATRICK HENRY EARLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Petitioner claims he was denied due process because the jury was advised of alleged unrelated criminal activity.

The United States in its Memorandum in Opposition has raised only one argument in opposition to the granting of this petition for Writ of Certiorari. The United States argues

that on several occasions petitioner's counsel at trial brought out testimony of petitioner's criminal acts, or the alleged criminal acts were brought out by counsel for the co-defendant. Without conceding that these instances would not in and of themselves constitute grounds for the granting of a mistrial, petitioner would invite this Honorable Court's attention to the fact that in at least two (2) instances the witness was being questioned by the attorney of the Government. (Pet. App. A24-A26)[1]

The United States' Memorandum in Opposition assumes that no evidence of other crimes of petitioner was presented to the jury through the interrogation by prosecuting attorney. The United States relies exclusively on *Ashton v. United States*, 324 F. 2d. 399, 400 (C.A.D.C.).

The petitioner respectfully submits that the repeated introduction of other alleged criminal activity to the jury by (1) unresponsive answers to counsel's questions, (2) questions eliciting such prejudicial information asked by counsel for co-defendant and (3) questions eliciting such prejudicial responses asked by the United States attorney[2] required the granting of a mistrial. The denial of such a mistrial was reversible error.

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[1] "Pet. App." refers to the Appendix in petitioner's Petition for Certiorari.

[2] On redirect examination of Government witness Vicky Hendricks by the U.S. Attorney, Mr. Lester, asked who had furnished drugs, to which the witness responded she did not know if they had been obtained from Earley. Defense Counsel objected. The Court overruled the objection. The U.S. Attorney then specifically asked the witness whether Earley had *ever* given the witness drugs to which the witness responded that he had given them to another. Counsel moved for mistrial which was denied.

The foregoing appears on pp. 654-657 of the transcript which is reproduced in Petitioner's Appendix (Pet. App. A24-A26)

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App., A-1) is in conflict with prior decisions of the Tenth Circuit, other Circuit Courts of Appeal and with the spirit if not the holdings of this Honorable Court in *Boyd v. United States*, 142 U.S. 450 (1892), *Michelson v. United States*, 335 U.S. 496 (1948), and *Marshall v. United States*, 360 U.S. 310 (1959). To resolve the conflict this Honorable Court should grant the instant Writ of Certiorari.

Respectfully submitted,

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December, 1973

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of December, 1973, I mailed five copies of the above and foregoing Reply Brief for Petitioner to the Solicitor General, Department of Justice, Washington, D.C. 20530 by placing the same in an envelope securely sealed with sufficient postage affixed thereto and depositing the same in the United States Mail.

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